# In the Supreme Court of the United States

**OCTOBER TERM, 1976**

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## CASE NO. 76-638

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**FINANCIAL FEDERAL SAVINGS & LOAN ASSOCIATION,**

*Petitioner,*

*vs.*

**BURLEIGH HOUSE, INC.,**

*Respondent.*

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# RESPONDENT'S BRIEF

## JURISDICTION

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## RESPONDENT'S BRIEF

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## INTRODUCTION

Petition For Certiorari is sought to review a decision of the Third District Court of Appeals of Florida. The parties will be referred to as they appear in this Court. Reference to Petitioner's Appendix will be by the letter "A". Since the Florida statutes Petitioner claims invalid were changed effective June, 1969 and this case only deals

with pre 1969 Florida law, the relevant Florida statutes as they appeared in 1969 are set out in Respondent's Appendix. Reference to Respondent's Appendix will be by the letters "AA".

## STATEMENT OF THE CASE

By an amended complaint filed in the Circuit Court for the Eleventh Judicial Circuit, Petitioner was charged with violating the usury laws of Florida by exacting twenty-one percent interest on a loan of money (AA. 1-10). It filed a motion to dismiss claiming the amended complaint pled insufficient facts (AA. 10-11). No Constitutional question was raised. It answered the complaint, admitting and denying and raising the applicable statute of limitations (AA. 12-14). No Constitutional question was raised. It moved for summary judgment claiming immunity from the usury law by virtue of a Florida exemption statute (AA. 15). It supported its motion by a memorandum of law outlining its argument (AA. 16-24). In neither the motion nor the memorandum was a Constitutional question raised. The case proceeded to trial on the amended complaint and answer. After the trial, in oral argument to the Judge, counsel for Petitioner opined that Florida's exemption statute might be unconstitutional (A. 43-44). This was the only mention of a Federal question in the state trial court. Florida requires that absent fundamental error, a Constitutional question, to be decided, must be first raised in the trial court by pleadings *Henderson v. Antonacci*, Fla. 62 So.2d 5.

No Constitutional question having been raised in the trial court, none was decided by the trial Judge who found that Petitioner had indeed violated Florida's usury statute and exacted over twenty percent interest (A. 24-32).



Florida requires that in order to be raised on appeal, absent fundamental error, a Constitutional question must first be properly raised in the trial court *Gleason v. Dade County*, Fla.App. 174 So.2d 466.

Petitioner filed its appeal to the Third District Court of Appeals of Florida. There are two levels of appellate courts in Florida, the Supreme Court and four District Courts of Appeal. Florida Appellate Rule 2.1(5) provides that:

> "Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right . . . from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution. . ."

The District Courts of Appeal have jurisdiction of appeals which may not be taken as a matter of right to the Supreme Court of Florida, Constitution of the State of Florida, Art. V, §4(b).

By appealing to the District Court of Appeal, rather than the Supreme Court of Florida, the Constitutional appellate court, no review was sought of any Constitutional point.

Petitioner filed assignments of error (AA. 25-30) and a brief containing points to be argued on appeal (AA. 31-32) as required by Florida Appellate Rule 3.7(f)(4). Neither raised a Constitutional question. Florida appellate

procedure requires that judicial error of the lower court be assigned and argued under separate points on appeal in an appellate brief *Florida Citrus Commission v. Owens*, Fla. App. 239 So.2d 840. Only at the conclusion of its brief and in its reply brief did Petitioner mention any Constitutional claim (A. 40-41). This was insufficient under Florida procedure to raise the point *State v. Miami Coin Club*, Fla. 88 So.2d 293.

The opinion of the District Court of Appeal, dated November 12, 1974 of which review is here sought, plainly did not pass upon any Constitutional question. None had been presented to it.

By a petition for rehearing to the District Court of Appeal, Petitioner first directly questioned the Constitutionality of Florida's exemption statute (A. 39). Under Florida procedure no new ground or position may be assumed in a petition for rehearing *Corporate Group Service, Inc. v. Lymberis, Fla.* 146 So.2d 745. The petition was denied January 9, 1975.

Petitioner then sought certiorari to the Supreme Court of Florida, a discretionary writ, based upon conflict with other opinions. Florida Appellate Rule 2.1(5)(b) provides:

> "Appeals from district courts of appeal may be taken to the Supreme Court as a matter of right only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. . . "



The term "initially passing upon the validity of a state statute" means in a given proceeding that the validity of a statute was first called into question in the District Court of Appeal, as where the case is one of original jurisdiction in the District Court of Appeal or where fundamental error is first there raised. It does not mean that the case must be one of first impression *State v. Furen*, Fla. 118 So.2d 6, *In re Kionka's Estate*, Fla. 121 So.2d 644 concurring opinion adopted in *Hightower v. Bigoney*, Fla. 156 So.2d 501. The Supreme Court of Florida, by the Constitution of Florida, Art. V, §3(b)(1) and Florida Appellate Rule 2.1(5) is the Court of last resort of Florida for cases passing upon the Constitutionality of a state statute. An appeal is there afforded as a matter of right.[1]

Petitioner did not appeal as a matter of right from the Third District Court of Appeal to the Supreme Court of Florida. It filed a petition for certiorari based upon decisional conflict. The Supreme Court found no decisional conflict and discharged the Writ of Certiorari. It never assumed jurisdiction.

Ten months after the District Court rendered its decision Petitioner sought review by this Court.

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[1]In all Florida cases where this Court has directed writ of certiorari to decisions of the District Courts of Appeal of Florida, Petitioners had attempted an appeal, as a matter of right to the Supreme Court of Florida *Ocala Star-Banner Co. v. Wahl*, 401 U.S. 295, 91 S.Ct. 628, 28 L. Ed. 2d 57, *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L. Ed. 2d 446.

## ARGUMENT

### I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEW WAS NOT RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD.

### II

CERTIORARI WILL NOT LIE SINCE THE CONSTITUTIONALITY OF THE STATUTE WAS NOT DRAWN INTO QUESTION IN THE TRIAL COURT, THE APPELLATE COURT OR MENTIONED IN THE DECISION SOUGHT REVIEW.

### III

CERTIORARI WILL NOT LIE, NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.



### I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEW WAS NOT RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD.

28 U.S.C. §1257 vests jurisdiction in the Supreme Court of the United States to review by certiorari:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . ."

28 U.S.C. §2101 requires a petition for writ of certiorari to be filed within ninety days of the judgment of that court.

Florida's highest court is the Supreme Court of Florida to which, in cases where the validity of a state statute is passed upon or the federal Constitution construed, an appeal is afforded as a matter of right. The Supreme Court of Florida also has discretionary jurisdiction to review by certiorari cases involving decisional conflicts. This Court has, by 28 U.S.C. §1257, jurisdiction to review by certiorari decisions of the highest court of a State:

> ". . . where the validity of a State statute is drawn into question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States . . ."

The highest court of Florida, in this instance, is the Supreme Court of Florida.

Petitioner did not appeal to the Supreme Court of Florida. It sought discretionary certiorari based on decisional conflict (A. 3-12, A. 37-38). The Supreme Court of Florida held it had no jurisdiction to review by certiorari since there was no decisional conflict (A. 3-7). Under Florida practice an appeal improvidently taken may be treated as a petition for certiorari, but a petition for certiorari improvidently taken may not be treated as an appeal *Bartow Growers Proc. Corp. v. Florida Gr. Proc. Corp.*, Fla. 71 So.2d 165.

Not having appealed to the Supreme Court of Florida, the highest court of that State, Petitioner cannot here obtain certiorari to review a decision of an intermediate state court.

Petitioner cites *Randall v. Board of Commissioners*, 201 U.S. 252, 43 S.Ct. 252, 67 L.Ed. 637 and *American Express Co. v. Levee*, 252 U.S. 19, 19 S.Ct. 11, 68 L.Ed. 140 in support of its contention that the writ will lie. Neither is applicable. *Randall* involved certiorari to the Indiana Appellate Court. The Supreme Court of Indiana had only discretionary jurisdiction which it declined to exercise. *American Express* involved certiorari to the Louisiana Court of Appeal rather than the Louisiana Supreme Court. Mr. Justice Holmes there pointed out:

> "But under the Constitution of the State jurisdiction of the Supreme Court is discretionary, Article VII, Section II, and although it was necessary for the Petitioner to invoke that jurisdiction to make it certain that the case could go no farther, when the jurisdiction was declined the Court of



> Appeal was shown to be the highest Court of the State in which a decision could be had . . ."

Here jurisdiction of the Supreme Court of Florida was not discretionary, but of right. Petitioner failed to invoke it by filing an appeal. More applicable is *Matthews v. Huwe*, 269 U.S. 262, 76 S.Ct. 108, 70 L.Ed. 266 where review was afforded to the Supreme Court of Ohio by both writ of error and writ of certiorari. Petitioner there filed a writ of error which was denied but did not file a petition for writ of certiorari. This Court held that petitioner had failed to exhaust all of its remedies for review by the Supreme Court of Ohio and declined to exercise jurisdiction. Also *Gorman v. Washington University*, 316 U.S. 98, 62 S.Ct. 962, 86 L.Ed. 1300 where Missouri permitted appeal to a division of the Supreme Court of Missouri in non-Constitutional cases but permitted appeal to the Court en banc in cases challenging the Constitutionality of a State statute. Petitioner had appealed to a division of the Court but had not requested a hearing en banc. This Court refused to exercise jurisdiction since Petitioner had failed to exhaust its State appellate remedies, the division Court was not the highest Court of the State. Finally *Gotthilf v. Sills*, 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187, a New York case where petitioner appealed to the Appellate Division and then attempted appeal unsuccessfully to the Court of Appeals. The order appealed was interlocutory. New York practice required permission from the Appellate Division to appeal an interlocutory order. This Court, declining to exercise jurisdiction held:

> "The petitioner at no time applied to the Appellate Division for such permission. It therefore appears that the Appellate Division, First Judi-

cial Department, was not the last state court in which a decision of that [constitutional] question could be had . . ."

Here Petitioner did not appeal to the Supreme Court of Florida either from the order of the trial Judge or from the decision of the Third District Court of Appeal. It had, under Florida law, a right of appeal to that Court on Constitutional questions. It failed to exercise that right.

Certiorari will not lie.

## II

CERTIORARI WILL NOT LIE SINCE THE CONSTITUTIONALITY OF THE STATUTE WAS NOT DRAWN INTO QUESTION IN THE TRIAL COURT, THE APPELLATE COURT OR MENTIONED IN THE DECISION SOUGHT REVIEW.

Florida practice requires that, absent fundamental error, before a Florida appellate court will pass upon a Constitutional issue, it must have first have been properly raised in the trial court *Carlton v. Fidelity & Deposit Company of Maryland*, Fla. 154 So. 317, *Gleason v. Dade County*, Fla. App. 174 So.2d 466. Even fundamental error must be briefed and argued. Petitioner did not challenge the validity of the statute here challenged in the trial court nor, until its petition for rehearing, in the Third District Court of Appeals. The decision here sought review reflects no Constitutional challenge nor does it pass upon any Constitutional point.



Where, though a requirement of state practice, the point arising under the Constitution of the United States is not properly drawn into question in the trial court, this Court will not grant Certiorari *Morrison v. Watson*, 154 U.S. 1111, 14 S.Ct. 995, *Erie Railroad v. Purdy*, 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847, *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480, *Louisville & Nashville Railroad Company v. Woodford*, 234 U.S. 546, 34 S.Ct. 739, 58 L.Ed. 1202. Where, though obliquely raised in the trial court it is not argued to the appeals court by proper assignment of error and brief, certiorari will not lie *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530. Where plainly the appellate court did not pass upon the Constitutional point, certiorari will not lie *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 572.

Under any test, here certiorari will not lie.

## III

CERTIORARI WILL NOT LIE, NO SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

There are no special and important reasons for granting a writ of certiorari in this case. There is no federal question to be here decided.

The Florida exemption statute, the application of which Petitioner claims violated its rights guaranteed by the Fourteenth Amendment to the United States Constitution, was no longer applicable after June of 1969. Florida's

statute of limitations for usury was two years (A. 16-23). No other states, it is claimed, have similar statutes. No issue of future application is raised.

The exemption statute in 1969, §665.161 F.S. exempted building and loan associations from the State usury laws. It was economic legislation not affecting fundamental rights, not Constitutionally suspect and only subject to question as to reasonability of the State classification *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 377, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797.

Building and Loan Associations created by Chapter 665 of the Florida Statutes were stock associations primarily limited to making loans to their own stockholders §665.01 F.S. Only when there was not sufficient demand for loans from stockholders could loans be made to outsiders §665.21(5) F.S. The maximum interest rate which could be charged was required to be set out in the by-laws adopted by the members who would borrow the money §665.18 F.S. In describing the building and loan exemption the Supreme Court of Florida in *Spinney v. Winter Park Building & Loan Assn.*, Fla. 162 So. 889 held:

> ". . . And so it is that one subscribed for stock for the very purpose of being eligible to become a borrower from the fund which he helps to create by the payment of his stock subscription. The stockholder of the building and loan association is recipient pro tanto of such benefits as may accrue from the contract which he executes with with the association as well as from the contracts which all other stockholders execute with the association. This being so the Legislature has lifted the ban of usury to such an extent as to allow the stockholders to contract more liberally between themselves . . ."



Federal Savings and Loan Associations are not stock associations and could not convert to stock associations until June 30, 1976 12 U.S.C. §1725(j)(l). They were not limited to loans to members 12 U.S.C. §1464(c). They were not limited in the interest they could charge by their by-laws. Interest rates are not set by the Home Loan Bank Board. Members did not receive the benefits of higher profits.

A rational basis existed in 1969 for the classification. No federal question was involved.

Even if no rational basis existed, in this case no federal question is involved. The Florida Court in the decision sought review held the statute means what it says, only building and loan associations are exempt, not savings and loan associations. This Court must accept the state court interpretation of the State statute *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 222. If Petitioner is correct the statute is unconstitutional, a total nullity *Perez v. Campbell*, (Supra). The statute is an exemption statute. If the exemption statute is void all associations building and loan as well as savings and loan are subject to Florida's usury act. Petitioner has no standing to here claim error, for if the statute is void or the statute is viable, it is still subject to Florida's usury act.

No special and important reasons exist for granting Writ of Certiorari.

## CONCLUSION

Petitioner does not seek certiorari to the highest Court of Florida in which a decision could be had. The petition was not filed within ninety days of the rendition of the decision sought review. Petitioner did not raise the Constitutional point timely under state practice. The opinion sought review clearly does not pass upon the validity of a state statute. No federal question is present. No compelling reason exists of granting the Writ sought.

Respectfully submitted,

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BY: _____
RICHARD L. LAPIDUS



## CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to SAM DANIELS, Esq., Attorney for Petitioner, 1414 duPont Building, Miami, Florida, 33131, and ROBERT ORSECK, Esq., Podhurst, Orseck & Parks, P.A., Attorneys for Petitioner, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 1 day of ~~November~~ Dec., 1976.

BY: _____
RICHARD L. LAPIDUS